



251997

PHYSICAL DOCUMENT

---

LPS-n251997-v1

---

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND CIVIL PENALTIES

**Author:** Woolner, Rhodora

**Document Type:** FILINGS

**LSA(s):**

**Co-Counsel:**

**Counsel LSA(s):**

**Distribution List:** Woolner, Rhodora (ENRD);Lattin, Sue (ENRD);Rose, Robert (ENRD);Reed, Jason (ENRD);True, Michael (ENRD);Goldsmith, Reese (ENRD)

**Fileroom:** LPS - Main Justice

**DJ#:**

**Case Name:**

**Court:** CA N.D. Cal.; 9th Cir.

**Notes:** SCANNED/UNASSIGNED - CALIFORNIA RIVER WATCH V. BERGER

**Double-Sided:**

**Received Date:** 10/21/2016

**Urgent:**

**Oversize:**

**Bound Document:**

LAW OFFICE OF  
DAVID J. WEINSOFF  
138 Ridgeway Avenue  
Fairfax, California 94930  
tel. 415•460•9760  
david@weinsofflaw.com

***Via Certified Mail -  
Return Receipt Requested***

October 17, 2016

Gina McCarthy, Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Citizen Suit Coordinator  
U.S. Department of Justice  
Environment and Natural Resource Division  
Law and Policy Section  
P.O. Box 7415  
Ben Franklin Station  
Washington, DC 20044-7415

DEPT. OF JUSTICE - ENRD  
ENVIRONMENT DIVISION  
16 OCT 21 PM 2:28

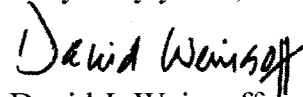
Re: *California River Watch v. Berger*  
USDC Northern District - Case No.: 3:16-cv-05644 EDL  
**Submission of Consent Decree for Agency Review**

Dear Administrator McCarthy and Citizen Suit Coordinator:

A copy of the Complaint filed in the above-referenced action is hereby being served pursuant to CWA § 505(c)(3), 33 U.S.C. § 1365(c)(3).

Enclosed also please find a fully executed [Proposed] Consent Decree entered into by the parties to the action. This Consent Decree is hereby being served pursuant to CWA § 505(c)(3), 33 U.S.C. § 1365(c)(3), and the regulations thereunder, 40 C.F.R. § 135.5, for such agencies' review and comment, where appropriate, within 45 days of service hereof.

Very truly yours,

  
David J. Weinsoff

DJW:lh  
Enclosures

cc: S. Wayne Rosenbaum, Esq. (*absent enclosures*)  
Josh Rosenbaum (*absent enclosures*)

David J. Weinsoff, Esq. SB # 141372  
LAW OFFICE OF DAVID J. WEINSOFF  
138 Ridgeway Avenue  
Fairfax, CA 94930  
Tel. (415) 460-9760  
Email: [david@weinsofflaw.com](mailto:david@weinsofflaw.com)

Attorneys for Plaintiff  
CALIFORNIA RIVER WATCH

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA RIVER WATCH, an IRC  
Section 501(c)(3), non-profit, public  
benefit corporation,

Plaintiff,

v.

BERGER, a California corporation,

Defendant.

Case No.: 3:16-cv-05644

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF AND CIVIL  
PENALTIES**

(Federal Water Pollution Control Act, 33  
U.S.C. §§ 1251, *et seq.*)

Plaintiff, CALIFORNIA RIVER WATCH, an Internal Revenue Code Section 501(c)(3),  
non-profit, public benefit Corporation (“River Watch” or “Plaintiff”), by and through its counsel,  
hereby alleges:

**I. JURISDICTION AND VENUE**

1. This is a civil suit brought under the citizen suit enforcement provisions of the Federal  
Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (“Clean Water Act” or “CWA”). This  
Court has jurisdiction over the parties and this action pursuant to Section 505(a)(1) of the CWA,  
33 U.S.C. § 1365(a)(1), and 28 U.S.C. §§ 1331 and 2201 (an action for declaratory and  
injunctive relief arising under the Constitution and laws of the United States).

2. On June 10, 2016, Plaintiff issued a 60-day notice letter (“Notice Letter”) to Berger  
 (“Berger” or Defendant”) regarding Defendant’s violations of the Clean Water Act, and of  
Plaintiff’s intention to file suit against Defendant. The Notice Letter was sent to the registered  
agent for Berger as required by 40 C.F.R. § 1325(a)(1), the Sun Land Garden Products Facility  
(the “Sun Land Facility” or “Site”) as well as the Administrator of the United States

1 Environmental Protection Agency (“EPA”), the Administrator of EPA Region IX, the Executive  
 2 Director of the State Water Resources control Board (“State Board”), and the Executive Officer  
 3 of the Regional Water Quality Control Board, Central Coast Region (“Regional Board”) as  
 4 required by CWA, 33 U.S.C. § 1365(b)(1)(A). A true and correct copy of the Notice Letter is  
 5 attached hereto as Exhibit A and incorporated herein.

6 3. More than sixty days has passed since the Notice Letter was served on Defendant and the  
 7 State and Federal agencies. Plaintiff is informed and believes, and thereon alleges, that neither  
 8 the EPA nor the State of California has commenced or is diligently prosecuting an action to  
 9 redress the violations in this Complaint. (33 U.S.C. § 1365(b)(1)(B)). This action is not barred  
 10 by any prior administrative penalty under Section 309(g) of the CWA, 33 U.S.C. § 13139(g).

11 4. Venue is proper in the Northern District of California pursuant to Section 505(c)(1) of  
 12 the CWA, 33 U.S.C. § 1365(c)(1), because the sources of the violations are located within this  
 13 judicial district.

## 14 II. INTRODUCTION

15 5. This Complaint seeks relief from Defendant’s unlawful discharge of pollutants into  
 16 waters of the United States from its operations at the Sun Land Facility at 90 Pioneer Road,  
 17 Watsonville, CA 95076. Specifically, Defendant discharges storm water runoff from the Site  
 18 to Pinto Lake (the “Receiving Waters”). This Complaint also seeks relief for Defendant’s  
 19 violations of other procedural and substantive requirements of California’s General Permit for  
 20 Discharges Associated with Industrial Activities (National Pollutant Discharge Elimination  
 21 System (“NPDES”) General Permit No. CAS000001 State Water Resources Control Board]  
 22 Water Quality Order No. 92-12-DWQ, as amended by Order No. 97-03-DWQ (“1997 Storm  
 23 Water Permit”), and as amended by Order No. 2014-0057-DWQ) (the “Industrial Permit”).  
 24 Defendant’s violations of the Clean Water Act and the Industrial Permit are ongoing and  
 25 continuous.

26 6. The discharge of pollutants in storm water from industrial activities such as the Sun Land  
 27 Facility contributes to the impairment of downstream waters and compromises or destroys their  
 28 beneficial uses.

### III. PARTIES

#### A. California River Watch

7. Plaintiff California River Watch is an Internal Revenue Code § 501(c)(3) non-profit, Public Benefit Corporation organized under the laws of the State of California, with its main office located at 290 South Main Street, #817, Sebastopol, CA 95472.

8. River Watch is dedicated to protecting enhancing, and helping to restore the surface waters and ground waters of California, including rivers, creeks, streams, wetlands, vernal pools, aquifers and associated environs, biota, flora, and fauna, and to educating the public concerning environmental issues associated with these environs.

9. River Watch acts in the interest of the public to prevent pollution in these waters, for the benefit of their ecosystem, and for the benefits of all individuals and communities who use these waterways for various recreational, educational, and spiritual purposes.

10. River Watch's use and enjoyment of the Receiving Waters is negatively affected by the pollution caused by Defendant's operations at the Sun Land Facility.

#### B. Berger

11. Plaintiff is informed and believes, and thereon alleges, that Defendant Berger is the owner and operator of the Sun land Facility, and has so owned and operated the Sun Land Facility since at least July of 2012.

### IV. STATUTORY BACKGROUND

#### A. The Clean Water Act

12. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into waters of the United States unless the discharge complies with various enumerated sections of the CWA. Among other things, Section 301(a) prohibits discharges not authorized by, or in violation of, the terms of a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

13. Section 402(p) of the CWA established a framework for regulating municipal and industrial storm water dischargers under the NPDES program. (33 U.S.C. § 13542(p)). States with approved NPDES permit programs are authorized by Section 402(b) to regulate industrial

1 storm water discharges through individual permits issued to dischargers and/or through the  
2 issuance of a single, statewide general permit applicable to all industrial storm water discharges.  
3 (33 U.S.C. § 1342).

4 14. Section 402(b) of the CWA allows each state to administer its own EPA-approved permit  
5 for storm water discharges. (33 U.S.C. § 1342(b)). In California, the State Board has accepted  
6 responsibility for regulating pollutants to protect California's water resources.

7 15. Section 301(b) requires that by March 31, 1989, all point source dischargers including  
8 those discharging polluted storm water, must achieve technology based effluent limitations by  
9 utilizing the Best Available Technology Economically Achievable ("BAT") for toxic and  
10 nonconventional pollutants and the Best Conventional Pollutant Control Technology ("BCT")  
11 for conventional pollutants. *See* 33 U.S.C. § 1311(b); 40 C.F.R. § 125.3(a)(2)(ii)-(iii).

12 16. The statewide general NPDES permit issued by the State Board pursuant to Section 402  
13 of the CWA regulates the discharge of pollutants from industrial sites. (33 U.S.C. § 1342).

14 17. Section 505(a)(1) of the CWA provides for citizen enforcement actions against any  
15 "person" who is alleged to be in violation of an "effluent standard or limitation . . . or an order  
16 issued by the Administrator or a State with respect to such a standard or limitation." (33 U.S.C.  
17 § 1365(a)(1)).

18 18. An action for injunctive relief under the CWA is authorized by 33 U.S.C. § 1365(a).

19 19. Each separate violation of the Clean Water Act subjects the violator to a penalty of up to  
20 \$37,500 per day/per violation for all violations occurring after January 27, 2009. (33 U.S.C. §  
21 1319(d); Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4).

22 20. Section 505(d) of the CWA permits prevailing parties to recover costs including  
23 attorneys' and experts' fees. (33 U.S.C. § 1365(d)).

24 **B. California's Industrial Permit**

25 21. The Industrial Permit, NPDES General Permit No. CAS000001, Water Quality Order No.  
26 92-12-DWQ, as amended by Order No. 97-03-DWQ and Order No. 2014-0057-DWQ, is a  
27 NPDES permit adopted pursuant to Section 402 of the CWA, 33 U.S.C. § 1342(b) and 40 C.F.R.  
28 § 123.25. In order to discharge storm water lawfully in California, industrial dischargers who

are subject to the provisions of the Industrial Permit must secure coverage under the Industrial Permit and comply with its terms, or obtain and comply with an individual NPDES permit. The Industrial Permit as amended pursuant to Order No. 2014-0057-DWQ became effective July 1, 2015.<sup>1</sup>

22. Failure to comply with the Industrial Permit constitutes a Clean Water Act violation. (Permit, § XXI.A).

23. Discharge Prohibition III.B of the Industrial Permit prohibits the direct or indirect discharge of materials other than storm water (“non-storm water discharges” or “NSWDs”), which are not otherwise regulated by a NPDES permit, to the waters of the United States. Discharge Prohibition II.C of the Industrial Permit prohibits storm water discharges and authorized NSWDs that cause or threaten to cause pollution, contamination, or nuisance.

24. Sections I.D. and V.A. of the Industrial Permit require facility operators to reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized NSWDs through the implementation of BAT for toxic pollutants and BCT for conventional pollutants.

25. Industrial Permit Receiving Water Limitation VI.B prohibits storm water discharges and authorized NSWDs to surface water that adversely impact human health or the environment.

26. Industrial Permit Receiving Water Limitation VI.A. prohibits storm water discharges and authorized NSWDs that cause or contribute to an exceedance of an applicable water quality standard in a Statewide Water Quality Control Plan or applicable Regional Board’s Basin Plan.

27. Sections X.A and X.B of the Industrial Permit require development and implementation of site-specific Storm Water Pollution Prevention Plans (“SWPPP”) by July 1, 2015 or upon commencement of industrial activity.

28. The objective of the SWPPP is to identify and evaluate sources of pollutants associated with industrial activities that may affect the quality of storm water discharges from the sites, and identify and implement site-specific Best Management Practices (“BMPs”) to reduce or prevent

---

<sup>1</sup> Throughout this Complaint, all references to the “Industrial Permit” are to the permit as amended by Order No. 2014-0057-DWQ effective July 1, 2015 unless otherwise stated.

1 pollutants associated with industrial activities in storm water discharges. (Industrial Permit,  
2 Section X.C.1).

3 29. To ensure its effectiveness, the SWPPP must be evaluated on an annual basis, and it must  
4 be revised as necessary to ensure compliance with the Industrial Permit. (Industrial Permit,  
5 Sections X.A and X.B.1).

6 30. Sections X.A to X.I. of the Industrial Permit set forth the requirements for a SWPPP.

7 31. The SWPPP must include a site map showing the facility boundaries, storm water  
8 drainage areas with flow patterns, nearby water bodies, the location of the storm water  
9 collection, conveyance and discharge system, structural control measures, areas of actual and  
10 potential pollutant contact, and areas of industrial activity. (Industrial Permit, Section X.E).

11 32. Dischargers are also required to prepare and implement a monitoring and reporting  
12 program ("M&RP"). (Industrial Permit, Section XI).

13 33. The objective of the M&RP is to ensure that BMPs have been adequately developed and  
14 implemented, reviewed as necessary, and to ensure that storm water discharges are in compliance  
15 with the Industrial Permit's Discharge Prohibitions, Effluent Limitations, and Receiving Water  
16 Limitations. (Industrial Permit, Finding J.56).

17 34. The Industrial Permit requires dischargers to conduct visual observations for the presence  
18 of unauthorized NSWDS, to document the source of any discharge, and to report the presence  
19 of any discolorations, stains, odors, and floating materials in the discharge.

20 35. The Industrial Permit requires dischargers to observe visually drainage areas during the  
21 wet season (October 1 – May 30) and to document the presence of any floating and suspended  
22 materials, oil and grease, discolorations, turbidity, or odor in the discharge and the source of any  
23 pollutants.

24 36. The Industrial Permit requires dischargers to maintain records of observations,  
25 observation data, locations observed, and responses taken to eliminate unauthorized NSWDS and  
26 reduce or prevent pollutants from contacting NSWDS and storm water discharges.

27 37. The Industrial Permit requires dischargers to collect and analyze storm water samples  
28 from up to two qualifying storm events in the first half of each reporting year (July 1 to



1 December 31) and two from the second half (January 1 to June 30). (Industrial Permit, Section  
2 XI.B.2).

3 38. Dischargers must analyze each sample for pH, total suspended solids, oil and grease, and  
4 other analytes likely to be present in significant quantities in the storm water discharged from  
5 the facility that are present as a result of industrial activities at the facility. (Industrial Permit,  
6 Section XI.B.6).

7 39. Dischargers must submit "Annual Reports" to the California Storm Water Multiple  
8 Application and Reporting Tracking System ("SMARTS") each year. (Industrial Permit, Section  
9 XVI.A).

## 10 V. STATEMENT OF FACTS

11 40. Plaintiff is informed, believes, and thereon alleges, the Sun Land Facility is a 21.7-acre  
12 soil mix, compost, and mulch processing and marketing facility. The Sun Land Facility belongs  
13 to Sector [10 ] of the Industrial Permit, and its primary standard industrial classification ("SIC")  
14 code is 2875 for "Fertilizers, Mixing Only and 2879 for "Pesticides and Agricultural Chemicals,  
15 Not Elsewhere Classified."

16 41. Plaintiff is informed, believes, and thereon alleges, that Sun Land Facility primarily  
17 engages in the business of processing and marketing soil mixes, compost, and mulch.

18 42. Plaintiff is informed, believes, and thereon alleges, that various materials comprised of  
19 the mix, compost and mulch covered under the SICs are utilized and stored onsite, and that  
20 Berger and/or operators of the Sun Land Facility conduct operations outdoors where the  
21 materials are subject to rain events.

22 43. Plaintiff is informed, believes, and thereon alleges that storm water is discharged from  
23 discharge points at the Sun Land Facility into Pinto Lake.

24 44. The EPA promulgated regulations for the CWA Section 402 NPDES permit program  
25 defining waters of the United States. (*See* 40 C.F.R. § 122.2). The EPA interprets waters of the  
26 United States to include not only traditionally navigable waters but also other waters, including  
27 water tributary to navigable waters, wetlands adjacent to navigable waters, and other waters  
28 including intermittent streams that could affect interstate commerce. The CWA requires any

1 person who discharges or proposes to discharge pollutants into waters of the United States to  
2 submit an NPDES permit application. (40 C.F.R. § 122.21).

3 45. The Clean Water Act confers jurisdiction over non-navigable waters that are tributary to  
4 traditionally navigable waters where the non-navigable water at issue has a significant nexus to  
5 the navigable water. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Northern California*  
6 *River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006)). A significant nexus is  
7 established if the “[receiving waters], either alone or in combination with similarly situated lands  
8 in the region, significantly affect the chemical, physical, and biological integrity of other covered  
9 waters.” (*Id.* at 780).

10 46. A significant nexus is also established if waters that are tributary to navigable waters have  
11 flood control properties, including functions such as the reduction of flow, pollutant trapping,  
12 and nutrient recycling. (*Id.* at 783).

13 47. Information available to Plaintiff indicates that Pinto Lake, the surface waters into which  
14 the Sun Land Facility discharges polluted storm water, is a traditional navigable water.

15 48. Plaintiff is informed, believes, and thereon alleges the discharges from the Sun Land  
16 Facility cause, threaten to cause, and/or contribute to the impairment of water quality in Pinto  
17 Lake. Elevated levels of nutrients and pH have resulted in the inability of Pinto Lake to support  
18 its beneficial uses.

19 49. Water Quality Standards are pollutant concentration levels determined by the State Board  
20 and the EPA to be protective of the beneficial uses of the receiving waters. Discharges above  
21 Water Quality Standards may contribute to the impairment of the receiving waters’ beneficial  
22 uses.

23 50. The applicable Water Quality Standards include, but are not limited to, those set out by  
24 the State of California in the Criteria for Priority Toxic Pollutants, 40 C.F.R. § 131.38,  
25 (“California Toxics Rule” or “CTR”) and in the Basin Plan. These numeric criteria are set to  
26 protect human health and the environment in the State of California. The CTR limits represented  
27 are the maximum concentration levels permissible to achieve health and environmental  
28 protection goals.

51. EPA Benchmarks are the pollutant concentrations above which the EPA has determined are indicative of a facility not successfully deploying or implementing BMPs that meet BAT for toxic pollutants and BCT for conventional pollutants. (See Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity (“MSGP”), 2015, §§ 6.2.1, 8.AA, Table 8.AA-1). The benchmark values provide an appropriate level to determine whether a facility’s storm water pollution prevention measures are successfully implemented. (MSGP Fact Sheet, p. 52). Failure to conduct and document corrective action and revision of control measures in response to benchmark exceedances constitutes a permit violation. (*Id.*, at p. 65).

52. The Regional Board’s Basin Plan established water quality objectives, implementation plans for point and non-point source discharges, and prohibitions, and furthers statewide plans and policies intended to preserve and enhance the beneficial uses of all water in the Central Coast Region (See Basin Plan at p. 1-1f). The Basin Plan identifies several beneficial uses for regional waters, including Pinto Lake.

**A. Past and Present Industrial Activity at the Sun Land Facility**

53. Plaintiff is informed, believes, and thereon alleges that, in its Notice of Intent to Obtain Coverage under the Industrial Permit submitted to the Regional Board, the Defendant lists its primary SIC codes as 2875 and 2879 for facilities primarily engaged in fertilizers, mixing only and pesticides and agricultural chemicals not otherwise specified, respectively.

54. The potential pollutant sources associated with the industrial activities at the Sun Land Facility include, but are not limited to: the business of processing and marketing soil mixes, compost, and mulch.

55. Plaintiff is informed, believes, and thereon alleges, that pollutants present in storm water discharged from the Sun Land Facility include but are not limited to: the pollutants identified in the four storm water samples provided via SMARTs on November 2, 2015, November 9, 2015, December 22, 2015, and March 7, 2016 – iron, zinc, total phosphorus, total suspended solids, nitrate as nitrogen, and total organic compounds.

56. Based upon Plaintiff’s investigation, Plaintiff is informed, believes, and thereon alleges, Defendant stores its soil mixes, compost, and mulch outside where it is exposed to storm water.

1 57. Plaintiff is informed, believes, and thereon alleges that there are containers stored on-Site  
2 that are uncovered and/or un-contained.

3 58. Plaintiff is informed, believes, and thereon alleges, that at least one discharge point at the  
4 Sun Land Facility conveys storm water pollution off the Site and into Pinto Lake.

5 59. Plaintiff is informed, believes, and thereon alleges, that the Sun Land Facility lacks  
6 effective BMPs to control the flow of storm water from Sun Land Facility into Pinto Lake.

7 60. Plaintiff is informed, believes, and thereon alleges, that the pollutants identified in  
8 paragraph 55 above have been, and continue to be conveyed from the Sun Land Facility into  
9 Pinto Lake.

10 61. Plaintiff is informed, believes, and thereon alleges, that during rain events at the Sun Land  
11 Facility, storm water carries pollutants from the Site and other sources directly into Pinto Lake.

12 62. Plaintiff is informed, believes, and thereon alleges, that the Sun Land Facility pollution  
13 control measures are ineffective in controlling the exposure of pollutant sources to storm water  
14 at the Sun Land Facility.

15 **B. The Sun Land Facility and its Associated Discharge of Pollutants**

16 63. Plaintiff is informed, believes, and thereon alleges, that with every significant rain event,  
17 the Sun Land Facility discharges polluted storm water from the industrial activities at the Sun  
18 Land Facility into the Receiving Waters.

19 64. Plaintiff is informed, believes, and thereon alleges, that the Receiving Water into which  
20 the Sun Land Facility discharges polluted storm water is a water of the United States and  
21 therefore the Industrial Permit properly regulates discharges to the Receiving Waters.

22 65. Surface waters that cannot support their Beneficial Uses as identified in the Basin Plan  
23 are designated as impaired water bodies pursuant to section 303(d) of the Clean Water Act.  
24 According to the CWA § 303(d) List of Impaired Water Bodies, Pinto Lake is impaired for  
25 Nutrients and pH.

26 66. Because discharges from the Sun Land Facility contain the pollutants identified in  
27 paragraph 55 above, the Sun Land Facility causes and/or contributes to the impairment of water  
28 quality in the Receiving Waters.

1 67. Plaintiff is informed, believes, and thereon alleges, that the storm water discharged from  
2 the Sun Land Facility has exceeded the CTR Water Quality Standard applicable to zinc in  
3 California. For example, Defendant's 2015-2016 Monitoring Data indicates levels of zinc as  
4 high as 0.71 mg/L which is almost six times the CTR limit of 0.12 mg/L and the EPA  
5 Benchmark value of 0.12 mg/L.<sup>2</sup> (MSGP §8.AA, Table 8.AA-1; Fact Sheet, p. 56).

6 68. Plaintiff is informed, believes and thereon alleges, that the storm water discharged from  
7 the Sun Land Facility has exceeded the EPA Benchmark and NAL values for iron, zinc, total  
8 phosphorus, total suspended solids, nitrate as nitrogen, and total organic compounds.

9 69. Plaintiff is informed, believes, and thereon alleges, that during every significant rain event  
10 that has occurred from July 1, 2015 through the present, Defendant has discharged and continues  
11 to discharge storm water from the Sun Land Facility that contains pollutants at levels in violation  
12 of the prohibitions and limitations set forth in the Industrial Permit and other applicable Water  
13 Quality Standards.

14 70. Plaintiff is informed, believes, and thereon alleges, from visual observations, sample  
15 results, and/or investigations available to Plaintiff, that Defendant has failed and continues to  
16 fail to develop and/or implement adequate BMPs to prevent the discharge of polluted storm  
17 water from the Sun Land Facility.

18 71. Plaintiff is informed, believes and thereon alleges, that storm water discharges from the  
19 Sun Land Facility contain pollutant concentration levels above EPA Benchmarks, the NAL, and  
20 applicable Water Quality Standards.

21 72. Plaintiff is informed, believes, and thereon alleges, that since at least July 1, 2015 through  
22 the present, Defendant has failed to develop and implement BMPs at the Sun Land Facility that  
23 meet the standards of BAT/BCT in violation of Effluent Limitation I.D and V.A of the Industrial  
24 Permit.

25 73. Each day Defendant has failed and continues to fail to implement adequate BMPs to  
26 achieve BAT/BCT constitutes a separate violation of the Industrial Permit and the CWA.

---

27  
28 <sup>2</sup> This benchmark value is hardness-dependent. Assuming the 100 mg/L water hardness range applies, the benchmark is 0.13 mg/L.

74. Plaintiff is informed, believes, and thereon alleges, that since at least July 1, 2015, Defendant has failed to submit written reports to the Regional Board identifying additional BMPs necessary to achieve BAT/BCT at the Sun Land Facility in violation of Industrial Permit Receiving Water Limitations VI.A-C.

## VI. CLAIMS FOR RELIEF

### A. FIRST CAUSE OF ACTION

#### **Discharges of Contaminated Storm Water in Violation of the Industrial Permit's Discharge Prohibitions and Receiving Water Limitations and the Clean Water Act (Violations of 33. U.S.C. §§ 1311(a), 1342)**

75. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

76. Plaintiff is informed, believes, and thereon alleges, that because of the operations at the Sun Land Facility, during every significant rain event, storm water containing pollutants harmful to fish, plant, bird life, and human health is discharged from the Sun Land Facility to the Receiving Waters.

77. Plaintiff is informed, believes, and thereon alleges, that Defendant's discharges of contaminated storm water from the Sun Land Facility have caused, continue to cause, and threaten to cause pollution, contamination, and/or nuisance to waters of the United States in violation of Sections III.C. and VI.C of the Industrial Permit.

78. Plaintiff is informed, believes, and thereon alleges, that these discharges of contaminated storm water from the Sun Land Facility have caused or contributed to, and continue to cause or contribute to an exceedance of Water Quality Standards in violation of Receiving Water Limitation VI.A of the Industrial Permit.

79. Plaintiff is informed, believes, and thereon alleges, that from at least July 1, 2015 through the present, Defendant has discharged, and continues to discharge, contaminated storm water from the Sun Land Facility to Receiving Waters in violation of the prohibitions of the Industrial Permit. Thus, Defendant is liable for civil penalties or at least four (4) violations of the Industrial Permit and the CWA.

80. Plaintiff is informed, believes, and thereon alleges that Defendant's violations of the Industrial Permit and the CWA are ongoing.

81. Defendant will continue to be in violation of the Industrial Permit requirements each day the Sun Land Facility discharges contaminated storm water in violation of Industrial Permit prohibitions.

82. Every day that Defendant has discharged and/or continues to discharge polluted storm water from the Sun Land Facility in violation of the Industrial Permit is a separate and distinct violation of Section 301(a) of the CWA, 33 U.S.C. 1311(a).

83. By committing the acts and omissions alleged above, Defendant is subject to an assessment of civil penalties for each and every violation of the CWA occurring from July 1, 2015 to the present pursuant to Sections 309(d) and 505 of the CWA, 33 U.S.C. §§ 1319(d) and 1365, and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4.

84. An action for injunctive relief under the CWA is authorized by 33 U.S.C. § 1365(a). Continuing commission of the acts and omissions alleged above would irreparably harm Plaintiff for which harm Plaintiff has no plain, speedy, or adequate remedy at law.

Wherefore, Plaintiff prays judgment against Defendant as set forth hereafter.

## **B. SECOND CAUSE OF ACTION**

### **Failure to Develop and/or Implement BMPs that Achieve Compliance with BAT and BCT in violation of the Industrial Permit and the Clean Water Act (Violations of 33 U.S.C § 1311, 1342)**

85. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

86. Plaintiff is informed, believes, and thereon alleges, that Defendant has failed to develop and/or implement BMPs for its operations at the Sun Land Facility that achieve compliance with BAT/BCT requirements of the Industrial Permit and the CWA.

87. Sampling of the Sun Land Facility's storm water discharges as well as Plaintiff's observations of the Sun Land Facility demonstrate that Defendant has neither developed nor implemented BMPs that meet the standard of BAT/BCT. Thus, Defendant is in violation of Effluent Limitations of the Industrial Permit and New Industrial Permit.

1 88. Plaintiff is informed, believes, and thereon alleges, that Defendant has been in daily and  
 2 continuous violation of the BAT/BCT requirements of the Industrial Permit and the CWA every  
 3 day since at least July 1, 2015. Plaintiff is informed, believes, and thereon alleges that  
 4 Defendant's violations of the Effluent Limitations and the CWA are ongoing.

5 89. Defendant will continue to be in violation of the Industrial Permit every day the  
 6 Defendant operates the Sun Land Facility without adequately developing and/or implementing  
 7 BMPs that achieve BAT/BCT to prevent or reduce pollutants associated with industrial activity  
 8 in storm water discharges.

9 90. Every day that Defendant operates the Sun Land Facility without adequately developing  
 10 and/or implementing BMPs that achieve BAT/BCT in violation of the Industrial Permit is a  
 11 separate and distinct violation of Section 301(a) of the CWA, 33 U.S.C. 1311(a).

12 91. By committing the acts and omissions alleged above, Defendant is subject to an  
 13 assessment of civil penalties for each and every violation of the CWA occurring from July 1,  
 14 2015 to the present pursuant to Sections 309(d) and 505 of the CWA, 33 U.S.C. §§ 1319(d) and  
 15 1365, and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4.

16 92. An action for injunctive relief under the CWA is authorized by 33 U.S.C. § 1365(a).  
 17 Continuing commission of the acts and omissions alleged above would irreparably harm Plaintiff  
 18 for which harm Plaintiff has no plain, speedy, or adequate remedy at law.

19 Wherefore, Plaintiff prays judgment against Defendant as set forth hereafter.

## 20 **VII. RELIEF REQUESTED**

21 93. Wherefore, Plaintiff respectfully requests that this Court grant the following relief:

- 22 a. A Court order declaring Defendant to have violated and to be in violation of  
 23 Section 301(a) of the CWA 33 U.S.C. § 1311(a) for its unlawful discharges of  
 24 pollutants from the Sun Land Facility in violation of the substantive and  
 25 procedural requirements of the Industrial Permit effective July 1, 2015;
- 26 b. A Court order enjoining Defendant from violating the substantive and procedural  
 27 requirements of the Industrial Permit;



- 1 c. A Court order assessing civil monetary penalties of \$37,500 per day/per violation  
2 for each violation of the CWA at the Sun Land Facility occurring since July 1,  
3 2015 as permitted by 33 U.S.C. § 1319(d) and Adjustment of Civil Monetary  
4 Penalties for Inflation, 40 C.F.R. § 19.4;
- 5 d. A Court order requiring Defendant to take appropriate actions to restore the  
6 quality of the Receiving Waters impaired by Defendants activities;
- 7 e. A Court order awarding Plaintiff its reasonable costs of suit, including attorney,  
8 witness, expert, and consultant fees, as permitted by Section 505(d) of the Clean  
9 Water Act, 33 U.S.C. § 1365(d);
- 10 f. Any other relief as this Court may deem appropriate.

11  
12 DATED: October 3, 2016

Respectfully submitted,

13 LAW OFFICE OF DAVID WEINSOFF

14 By: David Weinsoff  
15 David J. Weinsoff  
16 Attorney for Plaintiff  
17 CALIFORNIA RIVER WATCH  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# EXHIBIT A

LAW OFFICE OF  
DAVID J. WEINSOFF  
138 Ridgeway Avenue  
Fairfax, California 94930  
tel. 415-460-9760  
david@weinsofflaw.com

***Via Certified Mailing – Return Receipt***

June 10, 2016

Martin Reyes, Operations Manager  
Owner or Managing Agent  
Sun-Land Garden Products, Inc.  
90 Pioneer Road  
Watsonville, CA 95076

Owner or Managing Agent  
Berger - California Office  
90 Pioneer Road  
Watsonville, CA 95076

**Re: Notice of Violations and Intent to File Suit Under the Federal Water  
Pollution Control Act (Clean Water Act)**

Dear Mr. Reyes, Owners or Managing Agents:

**NOTICE OF ALLEGED VIOLATIONS**

This Notice is provided on behalf of California River Watch (“River Watch”) in regard to violations of the Clean Water Act (“CWA” or “Act”) 33 U.S.C. §1251 *et seq.*, that River Watch believes are occurring at the Sun-Land Garden Products facility owned and operated by Berger (“the Facility”) and located at 90 Pioneer Road in Watsonville, California. Notice is being sent to you as the responsible owners, operators, and managers of the Facility and real property. This Notice addresses the violations of the CWA, including violation of the terms of the General California Industrial Storm Water Permit, and the unlawful discharge of pollutants from the Facility to Pinto Lake, a CWA § 303(d) waterway impaired for nutrients and pH.

CWA §301(a), 33 U.S.C. §1311(a), prohibits the discharge of any pollutant into waters of the United States unless such discharge is in compliance with various enumerated sections of the Act. Among other things, Section 301(a) prohibits discharges not authorized by, or in violation of, the terms of an individual National Pollutant Discharge Elimination System (“NPDES”) permit or a general NPDES permit issued



pursuant to CWA §402(p), 33 U.S.C. §1342. CWA §402(p), 33 U.S.C. §1342(p), establishes a framework for regulating storm water discharges under the NPDES program. States with approved NPDES permitting programs are authorized under this section to regulate storm water discharges through permits issued to dischargers and/or through the issuance of a single, statewide general permit applicable to all storm water dischargers. Pursuant to CWA §402, the Administrator of the U.S. EPA has authorized California's State Water Resources Control Board to issue NPDES permits including general NPDES permits in California.

The State Water Resources Control Board elected to issue a statewide general permit for industrial discharges, and issued the General Permit on or about November 19, 1991, modified it on or about September 17, 1992, reissued it on or about April 17, 1997, and amended it significantly on April 1, 2014 (effective July 1, 2015), pursuant to CWA §402(p). In order to discharge storm water lawfully in California, industrial dischargers must comply with the terms of the General Permit or have obtained an individual NPDES permit and complied with its terms.

CWA §505(b) requires a citizen to give notice of the intent to file suit sixty (60) days prior to the initiation of a civil action under Section 505(a) of the Act. Notice must be given to the alleged violator, the U.S. Environmental Protection Agency ("EPA"), and the state in which the violations occur. As required by the CWA, this Notice provides notice of the violations that have occurred, and continue to occur at the Facility. Consequently, Sun-Land Garden Products, Inc. and Berger (collectively, the "Discharger") is placed on formal notice by River Watch that after the expiration of sixty (60) days from the date of this Notice, River Watch will be entitled to bring suit in the United States District Court against the Discharger for continuing violations of an effluent standard or limitation, National Pollutant Discharge Elimination System ("NPDES") permit condition or requirement, or Federal or State Order issued under the CWA (in particular, but not limited to, CWA §301(a), §402(p), and §505(a)(1), as well as the failure to comply with requirements set forth in the Code of Federal Regulations and the Central Coast Regional Water Quality Control Board ("RWQCB") Water Quality Control Plan or "Basin Plan."

The CWA requires that any Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto shall include sufficient information to permit the recipient to identify the following:

1. *The specific standard, limitation, or order alleged to have been violated.*

To comply with this requirement, River Watch notices the Discharger of ongoing violations of the substantive and procedural requirements of CWA §402(p) and violations of NPDES Permit No. CAS000001, State Water Resources Control Board, Order No. 92-12-DWQ as amended by Order No. 97-03-DWQ and Order No. 2014-0057-DWQ (the

“General Permit”) relating to the “growing mix” products services and operations covered under SIC Codes 2875 and 2879 at the Facility.

The Discharger, rather than seeking coverage under an individual NPDES permit, filed a Notice of Intent (“NOI”) agreeing to comply with the terms and conditions of the General Permit. The State Water Resources Control Board originally approved the NOI on or about July 31, 2002, and the Discharger was assigned Waste Discharger Identification (“WDID”) number 3 44I017406. River Watch, on the basis of eye-witness reports and records publicly available and/or records in the possession and control of the Discharger, contends that in the continuing operation of the Facility, the Discharger has failed and is failing to comply with the terms and conditions of the General Permit – specifically the requirements governing the preparation and implementation of effective Best Management Practices (“BMPs”) in its Storm Water Pollution Prevention Plan (“SWPPP”), and ensuring the elimination of all non-authorized storm water discharges from the Facility.

Compliance with these General Permit requirements is central to the effectiveness of the General Permit program. River Watch contends the Discharger has failed and is failing to comply with the following specific General Permit requirements as detailed in the sampling and monitoring provided on SMARTS for the 2015-2016 annual reporting year as follows:

a. Sampling Provided for 2015-2016 Annual Reporting Year Identify Storm Water Violations

The General Permit in effect beginning July 1, 2015 (Order No. 014-0057-DWQ), imposes new sampling and reporting requirements. Under Section XI.B. (“Sampling and Analysis”), the Discharger must collect and analyze storm water samples from two (2) qualifying storm events within the first half of each reporting year (July 1 to December 31), and from two (2) qualifying storm events within the second half of each reporting year (January 1 to June 30). The sampling and analytical results must be reported via SMARTS within thirty (30) days of obtaining the results.

A review of four (4) reported samples on SMARTS for the current annual reporting year (three qualifying storm events from the first half of the reporting year, but only one qualifying storm event as of the date of this Notice) identifies significant continuing violations – sampling results of discharges that exceed EPA “Benchmarks,” Parameter NAL Values, and/or applicable California Toxics Rule (“CTR”) limitations for the following pollutants:

- ***November 2, 2015 Sample***

Iron –	94 mg/L
Zinc –	0.43 mg/L
Total Phosphorus -	7.8 mg/L
TSS –	3900 mg/L
Nitrate as N	2.1 mg/L

- ***November 9, 2015 Sample***

Iron -	240 mg/L
Zinc -	0.71 mg/L
Total Phosphorus	13 mg/L
TSS -	6000 mg/L
Nitrate as N	4.2 mg/L
TOC -	270 mg/L

- ***December 22, 2015 Sample***

Iron -	25 mg/L
Total Phosphorus -	3.3 mg/L
TSS -	140 mg/L
Nitrate as N	0.90 mg/L
TOC -	160 mg/L

- ***March 7, 2016 Sample***

Iron -	2.4 mg/L
Total Phosphorus	3.1 mg/L
TSS -	330 mg/L

The continuing discharge of unauthorized non-storm water pollutants identified above confirms that the Discharger is violating General Permit Section X.C. (“SWPPP Performance Standards”). Under this section of the Permit, the “Discharger shall ensure a SWPPP is prepared to ... [i]dentify and describe the minimum BMPs [Best Management Practices] (Section X.H.1) and any advanced BMPs (Section X.H.2) implemented to reduce and prevent pollutants in industrial storm water discharges and authorized NSWDS. BMPs shall be selected to achieve compliance with this General Permit” (General Permit Section X.C.1.b.).

2. *The activity alleged to constitute a violation.*

The Discharger's operations are classified in the NOI under SIC Codes 2875 ("Fertilizers, Mixing Only") and 2879 ("Pesticides and Agricultural Chemicals, Not Elsewhere Classified"), and described in Section 1.2 of the Facility's SWPPP as "the business of processing and marketing soil mixes, compost, and mulch." Operations at the Facility create a range of "Potential Pollutant Sources," including those for which sampling and monitoring is specifically required under the General Permit, and those identified in Section 3.2 of the SWPPP ("List of Significant Materials") - perlite, vermiculite, dolomite, ferrous sulfate, gypsum, potassium sulfate, calcium carbonate, magnesium sulfate, potassium nitrate, lime, sulfur, fertilizer. The SWPPP for the Facility is formally dated September 2003 (with what appears to be hand-written amendments in 2011 and 2015).

The work at the Facility is conducted outdoors where it is subject to rain events. Because there is no State Water Resources Control Board or RWQCB exemption from the collecting and analyzing of the range of pollutants identified above, and without implementing effective BMPs, there are unlawful discharge(s) of the pollutants identified above from the Facility to Pinto Lake— a water of the United States.

To properly regulate these activities and control the discharge of these types of pollutants, the State Water Resources Control Board requires industrial facilities to obtain and comply with the terms and conditions of an individual NPDES permit or seek coverage under the General Permit (or obtain a proper exemption under the terms of the General Permit from its requirements). Review of the public record by River Watch reveals that the Discharger obtained coverage under the General Permit for the Facility, but fails to comply with its environmentally protective requirements, in particular the implementation of effective BMPs.

Note that in addition to the pollution controls in the General Permit, the RWQCB has established water quality standards applicable to facilities such as that operated by the Discharger in Watsonville. The RWQCB Basin Plan includes both a narrative toxicity standard and a narrative oil and grease standard, providing that "[w]aters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses." The Basin Plan establishes limits on metals, solvents, pesticides and other hydrocarbons.

3. *The person or persons responsible for the alleged violation.*

The persons and entities responsible for the alleged violations are Sun-Land Garden Products, Inc., Berger, and the owners or managing agents, referred to in this Notice as the Discharger.

4. *The location of the alleged violation.*

The location or locations of the various violations is the permanent address of the Facility at 90 Pioneer Road in Watsonville, California, including the waters of Pinto Lake – a water of the United States.

5. *The date or dates of violation or a reasonable range of dates during which the alleged activity occurred.*

The range of dates covered by this Notice is from June 10, 2011 to June 10, 2016. River Watch will from time to time further update this Notice to include all violations which occur after the range of dates covered by this Notice. Some of the violations are continuous in nature, therefore each day constitutes a violation.

6. *The full name, address, and telephone number of the person giving notice.*

The entity giving this Notice is California River Watch, an Internal Revenue Code § 501(c)(3) nonprofit, Public Benefit corporation organized under the laws of the State of California. River Watch's mailing address is 290 South Main Street, #817, Sebastopol, California 95472. River Watch is dedicated to protecting, enhancing and helping to restore surface and ground waters of California including rivers, creeks, streams, wetlands, vernal pools, aquifers and associated environs, biota, flora and fauna, and to educating the public concerning environmental issues associated with these environs.

River Watch may be contacted via email: [US@ncriverwatch.org](mailto:US@ncriverwatch.org), or through its attorneys. River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be directed to:

David Weinsoff, Esq.  
Law Office of David Weinsoff  
138 Ridgeway Avenue  
Fairfax, CA 94930  
Tel. 415-460-9760  
Email: [david@weinsofflaw.com](mailto:david@weinsofflaw.com)

### **REMEDIAL MEASURES REQUESTED**

River Watch believes that implementation of the following remedial measures are necessary in order to bring the Discharger into compliance with the CWA and reduce the biological impacts from its non-compliance upon public health and the environment surrounding the Facility:



1. Prohibition of the discharges of pollutants including, but not limited to, pH, total suspended solids, total organic carbon or oil & grease (the standard pollutants); with additional prohibitions for iron, N+N, lead, zinc, and phosphorus, all of which are specific General Permit Section XI. (Monitoring) "Table 1: Additional Analytical Parameters" required to be sampled for facilities identified under SIC codes 2875 and 2879.
2. Compliance with the terms and conditions of the General Permit, and BMPs detailed in the EPA's Industrial Stormwater Fact Sheet Series: "Sector C: Chemical and Allied Products Manufacturing and Refining" (EPA Office of Water, EPA-833-F-06-018, December 2006; [https://www.epa.gov/sites/production/files/2015-10/documents/sector\\_c\\_chemical.pdf](https://www.epa.gov/sites/production/files/2015-10/documents/sector_c_chemical.pdf)).
3. Compliance with the storm water sampling, monitoring and reporting requirements of the General Permit.
4. Preparation and submittal to the RWQCB of a "Reasonable Potential Analysis" for the Facility and its operations.
5. Preparation of further updates to the Facility's 2015 SWPPP that includes, but is not limited to, additional BMPs that address the violations alleged in this Notice Letter (with a copy provided to River Watch).

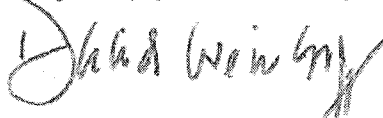
### CONCLUSION

The violations set forth in this Notice effect the health and enjoyment of members of River Watch who reside and recreate in the affected community. Members of River Watch may use the affected watershed for recreation, sports, fishing, swimming, hiking, photography, and/or nature walks. Their health, use, and enjoyment of this natural resource is specifically impaired by the Discharger's alleged violations of the CWA as set forth in this Notice.

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for un-permitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), §1362(5). An action for injunctive relief under the CWA is authorized by 33 U.S.C. §1365(a). Violators of the Act are also subject to an assessment of civil penalties of up to \$37,500 per day/per violation for all violations pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §§ 1319(d), 1365. *See also* 40 C.F.R. §§ 19.1-19.4. River Watch believes this Notice sufficiently states grounds for filing suit in federal court under the "citizen suit" provisions of CWA to obtain the relief provided for under the law.

The CWA specifically provides a **60-day** "notice period" to promote resolution of disputes. River Watch strongly encourages the Discharger to contact River Watch within **20 days** after receipt of this Notice Letter to: (1) initiate a discussion regarding the allegations detailed in this Notice, and (2) set a date for a site visit to the Facility. In the absence of productive discussions to resolve this dispute, or receipt of additional information demonstrating that the Discharger is in compliance with the strict terms and conditions of the General Permit, River Watch intends to file a citizen's suit under CWA § 505(a) when the 60-day notice period ends.

Very truly yours,

A handwritten signature in dark ink, appearing to read "David Weinsoff", written over a horizontal line.

David Weinsoff

DW:lhbm

*Service List*

Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N. W.  
Washington, D.C. 20460

Regional Administrator  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Executive Director  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812

Executive Officer  
Regional Water Quality Control Board  
Central Coast Region  
895 Aerovista Place / Suite 101  
San Luis Obispo, CA 93401-7906

Martin Reyes, Registered Agent  
Sun-Land Garden Products, Inc.  
1310 Primavera, Suite 108  
Salinas, CA 93901

1 David Weinsoff (SBN 141372)  
2 Law Office of David J. Weinsoff  
3 138 Ridgeway Avenue  
4 Fairfax, CA 94930  
5 Tel: 415.460.9760  
6 Email: [david@weinsofflaw.com](mailto:david@weinsofflaw.com)

7 Attorney for Plaintiff  
8 CALIFORNIA RIVER WATCH

9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 CALIFORNIA RIVER WATCH

Civil Case No. 3:16-cv-05644-EDL

12 Plaintiff,

**[PROPOSED] CONSENT DECREE**

13 vs.

14 BERGER, a California corporation;

**(Federal Water Pollution Control Act,  
33 U.S.C. §§ 1251 *et seq.*)**

15 Defendant,

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8

**WHEREAS**, on June 10, 2016 River Watch sent Berger, the United States Environmental Protection Agency (“EPA”), EPA Region IX, the State Water Resources Control Board (“State Board”), and the Central Coast Water Quality Control Board (“Regional Board”) a notice of intent to file suit (“Notice Letter”) under Sections 505(a) and (b) of the Clean Water Act, 33 U.S.C. §§ 1365(a) and (b).

1 The Notice Letter alleged violations of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), and  
2 violations of the 2014 Storm Water Permit at the Facility;

3 **WHEREAS**, on October 5, 2016 River Watch filed a complaint against Berger in the United  
4 States District Court, Northern District of California (3:16-cv-05644-EDL) alleging violations of  
5 Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), and violations of Permit at the Facility  
6 (“Complaint”);

7 **WHEREAS**, River Watch alleges Berger to be in violation of the substantive and procedural  
8 requirements of the Permit and the Clean Water Act with respect to the Facility;

9 **WHEREAS**, Berger denies all allegations in the Notice Letter and Complaint relating to the  
10 Facility;

11 **WHEREAS**, River Watch and Berger have agreed that it is in the Parties’ mutual interest to  
12 enter into a Consent Decree setting forth terms and conditions appropriate to resolving the allegations  
13 set forth in the Complaint without further proceedings (the “Consent Decree”); and

14 **WHEREAS**, all actions taken by Berger pursuant to this Consent Decree shall be made in  
15 compliance with all applicable federal and state laws and local rules and regulations.

16 **NOW THEREFORE IT IS HEREBY STIPULATED BETWEEN THE SETTling**  
17 **PARTIES AND ORDERED AND DECREED BY THE COURT AS FOLLOWS:**

18 1. The Court has jurisdiction over the subject matter of this action pursuant to Section  
19 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a);

20 2. Venue is appropriate in the Northern District of California pursuant to Section 505(c)(1)  
21 of the Clean Water Act, 33 U.S.C. § 1365(c)(1), because the Facility is located within this District;

22 3. The Complaint states claims upon which relief may be granted pursuant to Section  
23 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1);

24 4. River Watch has standing to bring this action;

25 5. The Court shall retain jurisdiction over this matter for purposes of enforcing the terms of  
26 this Consent Decree for the life of the Consent Decree, or as long thereafter as is necessary for the Court  
27 to resolve any motion to enforce this Consent Decree.

28 **I. OBJECTIVES**

1 It is the express purpose of the Settling Parties entering into this Consent Decree to further the  
2 objectives set forth in the Clean Water Act, 33 U.S.C. §§ 1251, et seq., and to resolve those issues  
3 alleged by River Watch in their Complaint. In light of these objectives and as set forth fully below,  
4 Berger agrees to comply with the provisions of this Consent Decree and to comply with the  
5 requirements of the Permit and all applicable provisions of the Clean Water Act. Specifically, Berger  
6 agrees to comply with Receiving Water Limitation VI.A of the Permit which requires that Berger “shall  
7 ensure that industrial storm water discharges and authorized Non-Storm Water Discharges (“NSWDs”)  
8 do not cause or contribute to the exceedance of any applicable water quality standards in any affected  
9 receiving water,” and Effluent Limitation V.A. of the Permit which requires that Berger “shall  
10 implement Best Management Practices (“BMPs”) that comply with the BAT/BCT requirements of the  
11 [Permit] to reduce or prevent discharges of pollutants in [Berger’s] storm water discharge in a manner  
12 that reflects best industry practice considering technological availability and economic practicability and  
13 achievability.” Berger shall develop and implement BMPs necessary to achieve compliance with  
14 BAT/BCT standards and with the applicable water quality standards as those terms are defined by the  
15 Permit.

## 16 **II. AGENCY REVIEW AND TERM OF CONSENT DECREE**

17 **A. Agency Approval.** River Watch shall submit this Consent Decree to the United States  
18 Department of Justice and the EPA (collectively “Federal Agencies”) within three (3) days of the final  
19 signatures of the Settling Parties for agency review consistent with 40 C.F.R. § 135.5. The agency  
20 review period expires forty-five (45) days after receipt by both agencies, as evidenced by written  
21 acknowledgement of receipt by the agencies or the certified return receipts, copies of which shall be  
22 provided to Berger if requested. In the event that the Federal Agencies object to entry of this Consent  
23 Decree, the Parties agree to meet and confer to attempt to resolve the issue(s) raised by the Federal  
24 Agencies within a reasonable amount of time.

25 **B. Effective Date.** The term “Effective Date” as used in this Consent Decree shall mean the day the  
26 Court enters this Consent Decree.

27 **C. Termination Date.** This Consent Decree shall terminate two (2) years after the Effective Date  
28 (“Termination Date”), unless there is a prior ongoing, unresolved dispute regarding Berger’s compliance

1 with this Consent Decree.

2 **D. Inspection of Facility.** River Watch may conduct an inspection of the Berger Facility up to sixty  
3 (60) days prior to the Termination Date. The inspection shall be conducted according to the rules  
4 applicable to annual site inspections described below.

5 **III. POLLUTION CONTROL REQUIREMENTS**

6 **A. Storm Water Pollution Reduction Measures**

7 1. The storm water pollution control measures required by this Consent Decree shall be  
8 designed and operated to manage storm water discharges, through full compliance with the  
9 Permit.

10 2. Commencing October 1, 2016 through Effective Date Berger shall engage in the  
11 following activities to achieve compliance with the Permit and this Consent Decree:

12 (a) Berger will appoint a Qualified Industrial Storm Water Practitioner ("QISP") by October  
13 1, 2016;

14 (b) Level 1 ERA Evaluations – By October 1, 2016, Berger shall:

15 (i) Complete an evaluation, with the assistance of a QISP, of the industrial pollutant  
16 sources at the Facility that are or may be related to the exceedance(s) of numeric  
17 effluent limits set forth in this Consent Decree; and

18 (ii) Identify in the evaluation the corresponding BMPs in the Storm Water Pollution  
19 Prevention Plan ("SWPPP") and any additional BMPs and SWPPP revisions  
20 necessary to prevent future exceedances of numeric effluent limits set forth in the  
21 Permit.

22 (iii) **Level 1 Action Plan and ERA Report.** Based upon the above evaluation, Berger  
23 shall, as soon as practicable, but no later than January 1, 2017:

24 a) Revise the SWPPP as necessary and implement any additional BMPs  
25 identified in the evaluation; and

26 b) Certify and submit to River Watch, the Court and the Central Coast Regional  
27 Water Quality Control Board ("RWQCB") via SMARTS a Level 1 Action  
28 Plan/ERA Report prepared by a QISP that includes the following:



1 1) A summary of the Level 1 ERA Evaluation required in by this provision;  
2 and

3 2) A detailed description of the SWPPP revisions and any additional BMPs  
4 for each parameter that exceeded a numeric action limit ("NAL") of the  
5 Permit.

6 c) Certify and submit to River Watch, the Court and the RWQCB via SMARTS  
7 the QISP's identification number, name, and contact information (telephone  
8 number, e-mail address).

9 3. In addition to the activities described in Sections III.A.2(a) and (b) above, Berger will  
10 assure, to the extent feasible, implement and maintain all of the following BMPs, as more fully  
11 described in Berger's SWPPP, which shall be implemented at the Berger Facility, the boundaries  
12 of which are outlined on the Berger Facility Site Map ("Site Map"). The Parties agree that the  
13 SWPPP may be modified from time to time as more fully required by the Permit. In the event of  
14 a modification to the SWPPP or Facility Site Map, Berger will provide within twenty (20)  
15 business days a copy of the revised exhibits to River Watch, the Court in the manner described  
16 herein, and the RWQCB via SMARTS.

17 **(a) Non-Structural BMPs**

18 **(i) Good Housekeeping**

- 19 a) Observe and maintain industrial activity outdoor areas;  
20 b) Minimize or prevent material tracking offsite;  
21 c) Minimize dust generated by industrial activities;  
22 d) Cleanup areas affected by rinse and wash water;  
23 e) To the extent practical, cover stored industrial materials that can be readily  
24 mobilized by contact with storm water;  
25 f) Contain stored non-solid industrial materials or wastes;  
26 g) Prevent improper disposal of rinse/wash waters; and  
27 h) Minimize flows of offsite storm water and NSWDS into material handling  
28 areas.

1                   (ii)    **Preventative Maintenance**

- 2                   a) Identify industrial equipment and systems that may leak;
- 3                   b) Observe the equipment and systems to detect leaks;
- 4                   c) Establish a schedule for maintenance; and
- 5                   d) Establish procedures for necessary maintenance and repair.

6                   (iii)   **Spill Prevention and Response Procedures**

- 7                   a) Establish procedures and/or controls to minimize spills and leaks;
- 8                   b) Develop and implement spill and leak response procedures to prevent
- 9                   industrial materials from being discharged;
- 10                  c) Clean up spills and leaks promptly;
- 11                  d) Identify and describe needed spill and leak response equipment; and
- 12                  e) Train Storm Water Team personnel ("Team Members") in appropriate spill
- 13                  response.

14                  (iv)   **Material Handling and Waste Management**

- 15                  a) Prevent or minimize handling of industrial materials or wastes that can be
- 16                  readily mobilized;
- 17                  b) Contain all stored non-solid industrial materials or wastes that can be
- 18                  transported or dispersed by the wind or rain;
- 19                  c) Cover industrial waste disposal containers and industrial material storage
- 20                  containers that contain industrial materials when not in use;
- 21                  d) Divert run-on and storm water generated from the Facility within the Facility
- 22                  away from all stockpiled materials;
- 23                  e) Clean all spills of industrial materials or wastes; and
- 24                  f) Observe and clean as appropriate any outdoor material or waste that could
- 25                  cause contamination to storm water if contact is made.

26                  (v)    **Erosion and Sediment Controls**

- 27                  a) Implement effective wind erosion controls;
- 28                  b) Provide effective stabilization for inactive areas, finished slopes, and other

1 areas prior to a forecasted storm event based on the closest National Oceanic  
2 and Atmospheric Administration ("NOAA") whether station.;

3 c) Maintain effective perimeter controls and stabilize site entrances;

4 d) Divert run-on and storm water generated from within the Facility away from  
5 erodible materials; and

6 e) Properly design and maintain sediment basins.

7 (vi) **Employee Training.** Berger's QISP will provide sufficient training to the  
8 appropriate Team Members assigned to perform activities required by the Permit  
9 including:

10 a) Preparing or acquiring necessary and appropriate training manuals;

11 b) Providing a training schedule; and

12 c) Maintaining training documentation.

13 (vii) **Quality Assurance and Record Keeping**

14 a) Develop and implement management procedures to ensure implementation of  
15 plans;

16 b) Develop a method of tracking and recording program implementation; and

17 c) Maintain implementation records (i.e., BMP deployment records, employee  
18 training logs, spill occurrence and clean-up records).

19 (b) **Advanced BMPs.** Advanced BMPs will be implemented to the extent appropriate and  
20 feasible, in conjunction with industry standards and applicable to the Facilities industrial  
21 activities in order to prevent and reduce storm water contact with industrial

22 (c) **Non-Storm Water Discharges (NSWDs)**

23 (i) Reduce or prevent the contact of authorized NSWDs with materials or equipment  
24 that are potential sources of pollutants;

25 (ii) Reduce, to the extent practicable, the flow or volume of authorized NSWDs;

26 (iii) Ensure that authorized NSWDs do not contain quantities of pollutants that cause  
27 or contribute to an exceedance of water quality standards ("WQS") as set forth in  
28 the RWQCB Basin Plan; and

(iv) Reduce or prevent discharges of pollutants in authorized NSWs in a manner that reflects best industry practice considering technological availability and economic practicability and achievability.

(v) **Waste, Garbage, and Floatable Debris**

- a) Dispose of grass clippings, leaves, sticks, or other collected vegetation as garbage, or by composting. Do not dispose of collected vegetation into waterways or storm drainage systems; and
- b) Waste receptacles exposed to storm water shall be tightly closed or otherwise covered when not in use.

**B. Numeric Action Levels for Discharges from the Berger Facility.** Exceedances of the values presented in Table 1 indicate to the discharger that additional BMPs may be needed in order to comply with BAT/BCT.

**Table 1: Numeric Action Levels for Discharges**

Pollutant	Test Method	Units	Annual NAL	Instantaneous Maximum NAL
pH	Per IGP Section XI.C.2	pH units	N/A	Less than 6.0, Greater than 9.0
Total Suspended Solids	SM-2540-D	mg/L	100	400
Oil and Grease	EPA-1664A	mg/L	15	25
Total Recoverable Zinc	EPA-200.8	mg/L	0.26 <sup>1</sup>	N/A
Total Recoverable Lead	EPA-200.8	mg/L	0.262	N/A
Total Recoverable Iron	EPA-200.8	mg/L	1.0 mg/L	N/A
Total Recoverable Phosphorus	EPA-200.8	mg/L	1.0 mg/L as P	N/A
Nitrate + Nitrate Nitrogen	SM4500-NO3-E	mg/L	0.68 mg/L	N/A

**C. Level 2 Status**

**1. Level 2 Action Plan.** Berger shall compare the analytical results of the storm water samples collected at the Facility for those Qualifying Storm Events (“QSEs”) Berger is required to sample pursuant to the terms of the Permit to the corresponding instantaneous maximum NAL exceedance<sup>2</sup> or annual NAL exceedance<sup>3</sup> as specified in Table 1. If it is determined that a NAL exceedance has occurred for the same parameter while Berger is in Level 1, any time after

<sup>1</sup> Or as adjusted based on California Toxic Rule hardness provisions.

<sup>2</sup> An Instantaneous Maximum NAL Exceedance occurs when two or more analytical results from samples taken for any single parameter within a reporting year exceed the instantaneous maximum NAL value as illustrated in Table 1.

<sup>3</sup> An Annual NAL Exceedance occurs when the average concentration for each parameter using the results of all the samples taken for the entire facility over the reporting year.

October 1, 2016, Berger shall certify and submit a Level 2 Action Plan that identifies industrial activity BMP demonstrations the Facility has selected to perform to River Watch, the Court, and the RWQCB via SMARTS by 1 following the reporting year during which the exceedance occurred.

**2. Level 2 Action Plan Requirements.** Each Level 2 Action Plan submitted shall be prepared by a QISP and include one or more of the following demonstrations

- (a) The identification of the contaminant(s) discharged in excess of the numeric value(s) in Table 1;
- (b) An assessment of all pollutant sources of each contaminant discharged in excess of the numeric value(s) in Table 1 and the extent to which those contaminants are associated with industrial activities at the Facility; and
- (c) For contaminants associated with industrial activities, the identification of additional BMPs that shall be implemented to achieve compliance with the Table 1 Limit(s), as well as the design plans and calculations of these additional BMPs, or, in the alternative, an evaluation of any additional BMPs that would reduce or prevent an exceedance, estimated costs of the additional BMPs evaluated, an analysis demonstrating that the additional BMPs needed to prevent the exceedance are not BAT/BCT and are not required to ensure discharges do not cause or contribute to violations of water quality standards, and an analysis describing the basis for the selection of BMPs implemented in lieu of the additional BMPs evaluated but not implemented.
- (d) **Implementation Schedule.** The time schedules for implementation shall be as soon as practicable and completed no later than 1 year after submitting the ERA report.

**D. Sampling and Analysis**

1. Berger shall install a recording rain gauge capable of recording rainfall to 0.1 inches at the Berger Facility within thirty (30) days of the Effective Date. Berger shall maintain the recording rain gauge in accordance with the manufacturers' recommendations, maintain records of all maintenance and rain data, and provide such rain gauge data to River Watch with Berger's Monitoring Report described in F below for the term of this Consent Decree. In the event there is

1 a dispute about the quantity of rainfall at the Facility, the rain gauge installed pursuant to this  
2 section shall be deemed to be the actual rainfall at the site.

3 2. By October 1, 2016, Berger shall develop a plan for monitoring all storm water and  
4 NSWDS from the Berger Facility that meets the requirements of the Permit and incorporate same  
5 into its SWPPP.

6 3. During the life of this Consent Decree, Berger shall collect samples of any Qualifying  
7 Storm Event ("QSE") from at least two Qualifying Storm Event ("QSE") within the first half of  
8 each reporting year (July 1 – December 31) and at least two QSE within the second half of each  
9 reporting year (January 1 – June 30) from each sampling point at the Facility in conformity with  
10 its Storm Water Monitoring Implementation Plan ("Monitoring Plan") and in compliance with  
11 the Permit. Should Berger demonstrate full compliance with all of the NALs in Table 1 for four  
12 (4) consecutive QSEs, Berger may reduce sampling in compliance with XI.C.7 of the Permit.

13 4. Berger shall comply with the analytical methods as required by Section XI.B of the  
14 Permit as more fully described in the Monitoring Plan.

15 5. Berger shall request that results of all sample analyses required by the Permit be reported  
16 to it within fifteen (15) business days of laboratory receipt of the sample.

17 6. Berger shall provide the complete laboratory results of samples collected as required by  
18 the Permit to River Watch concurrently with the posting of same on SMARTS or no later than  
19 thirty (30) days from receipt of the sample results from the laboratory, whichever is sooner.

20 **E. Visual Observations.** During the life of this Consent Decree, Berger shall conduct and  
21 document visual observations pursuant to Section XI.A of the Permit and as more fully described in the  
22 Facility's SWPPP.

23 **F. Annual Comprehensive Facility Compliance Evaluation**

24 1. Berger shall conduct an Annual Comprehensive Facility Compliance Evaluation  
25 ("Annual Evaluation") for each reporting year.

26 2. Berger shall submit a copy of the Annual Evaluation to River Watch within 90 days of  
27 Annual Evaluation that contains the following information:

28 (a) A review of all sampling, visual observations, and inspection records conducted during

the previous reporting year;

(b) An inspection of all areas of industrial activity and associated potential pollutant sources for evidence of, or the potential for, pollutants entering the storm water conveyance system;

(c) An inspection of all drainage areas previously identified as having no exposure to industrial activities and materials in accordance with the definitions in Section XVII of the Permit;

(d) An inspection of equipment needed to implement the BMPs identified in the SWPPP;

(e) An inspection of any structural BMPs identified in the SWPPP;

(f) A review and effectiveness assessment of all BMPs identified in the SWPPP for each area of industrial activity and associated potential pollutant sources to determine if the BMPs are properly designed, implemented, and are effective in reducing and preventing pollutants in industrial storm water discharges and authorized NSWDS; and

(g) An assessment of any other factors needed to comply the requirements of XVI.B.

3. Within 90 days of the Annual Evaluation, Berger shall revise its Monitoring Plan for the Facility to incorporate all sampling, analysis, observation, and reporting requirements of the Permit.

#### **G. Storm Water Pollution Prevention Plan Revisions**

1. Within 90 days of the Annual Evaluation, Berger shall revise its SWPPP for the Facility to incorporate all sampling, analysis, observation, and reporting requirements of the Permit.

2. Berger shall engage a QISP to revise the SWPPP for the Berger Facility if there are any changes in the Facility's operations, including, but not limited to, changes to storm water discharge point(s) or revisions and/or additions to the BMPs implemented pursuant to the IGP.

#### **H. Employee Training**

1. In addition to Section III.A.(3)(a)(vi) above, within ninety (90) days of the Effective Date of this Consent Decree, Berger shall develop and implement a training program, in compliance with Section X.H.1.f., X.H.1.g., and IX of the Permit ("Training Program"). At a minimum the Training Program shall include at least the following:

1       **(a) Language.** Berger shall conduct the Training Program in English. If there are any Team  
2       Members who do not understand English sufficiently to understand the Training  
3       Program, then Berger shall conduct the Training Program also in the language or  
4       languages in which those identified employees participating in the Training Program  
5       understand.

6       **(b) Non-Storm Water Discharges.** Berger shall train all Team Members on the Permit's  
7       prohibition of NSWDS, so that employees know what NSWDS are, that NSWDS can  
8       result from improper surface washing or dust control methods, and how to detect and  
9       prevent NSWDS to ensure compliance with this Consent Decree and the Permit.

10      **(c) BMPs.** Berger shall train all Team Members on BMP implementation and maintenance  
11      to ensure that BMPs are implemented effectively to minimize the exposure of pollutants  
12      at the Facility to storm water and minimize the discharge of contaminated storm water at  
13      the Facility

14      **(d) Storm Water Sampling.** Berger shall designate an adequate number of Team Members  
15      to collect storm water samples from each discharge location as required by this Consent  
16      Decree. The training shall include the proper sampling protocols, including chain of  
17      custody requirements, to ensure storm water samples are properly collected, stored, and  
18      submitted to a certified laboratory.

19      **(e) Visual Observation Training.** Berger shall provide training to all Team Members at the  
20      Facility regarding visual observations pursuant to this Consent Decree and the Permit.

21      **2.** Training shall be provided by a QISP who is familiar with the requirements of this  
22      Consent Decree and the Permit. The training shall be as necessary to ensure that all such Team  
23      Members are familiar with the requirements of the Permit and the Facility's SWPPP or  
24      Monitoring Plan.

25      **3.** Berger shall maintain training records to document compliance with this Section, and  
26      shall provide River Watch with a copy of these records in its annual monitoring and reporting  
27      document described above.

28      **IV. MONITORING AND REPORTING**



1 **A. Site Inspections.**

2 1. Every year during the life of this Consent Decree, up to three (3) of River Watch'  
3 representatives may participate in the Berger Facility Annual Evaluation site inspection as more  
4 fully described in section XV of the Permit (the "Site Inspection"). Site inspections shall occur  
5 during normal business hours. Berger shall provide River Watch and River Watch's counsel of  
6 record with at least ten (10) business days' notice prior to a Site Inspection. Notice shall be  
7 provided by electronic mail to Berger's counsel of record. River Watch shall respond by  
8 electronic mail and state the names of all persons that River Watch will bring to the Site  
9 Inspection.

10 2. River Watch shall provide Berger with any comments regarding the Site Inspection  
11 within seventy-two (72) hours of the completion thereof. Said comments shall be prepared,  
12 signed and certified by River Watch's designated QISP. Berger shall respond to River Watch's  
13 comment within sixty (60) days from the date they are received, however, Berger is not obligated  
14 to respond to any comments regarding the Site Inspection received after seventy-two (72) hours  
15 comment period has passed.

16 **B. Compliance Monitoring and Oversight.** Berger shall make a onetime payment of Two  
17 Thousand Five Hundred dollars (\$2,500.00) to compensate River Watch for costs and fees to be incurred  
18 for monitoring Berger's compliance with this Consent Decree. Payment shall be made within ten (10)  
19 business days of the Effective Date payable to "River Watch" via U.S. Mail.

20 **C. Action Plan Payment.** Berger shall pay One Thousand Dollars (\$1,000) each time an Action  
21 Plan is submitted to River Watch. Payments shall be submitted simultaneously with the submittal of the  
22 Action Plan. Payments shall be made payable to "River Watch" via U.S. Mail.

23 **V. ENVIRONMENTAL PROJECT & REIMBURSEMENT OF LITIGATION FEES & COSTS**

24 **A. Environmental Project.** To remediate the alleged environmental harms resulting from non-  
25 compliance with the Permit alleged in the Complaint, Berger agrees to make a payment of Ten  
26 Thousand Dollars (\$10,000.00) to University of California at San Diego Extension Services to fund  
27 tuition grants for owners and employees of women and minority businesses seeking training on the IGP.  
28 The payments shall be made within ten (10) business days of the Effective Date payable to "The

1 Reagents of the University of California, UCSD” and mailed to UC San Diego Extension, attention  
2 Laura Fandino, 8950 Villa La Jolla Drive, Suite A2014, La Jolla, CA 92037-1712.

3 **B. Reimbursement of Attorneys’ Fees and Costs.** Berger shall pay a total of Twenty-seven  
4 Thousand Five Hundred Dollars (\$27,500.00) to River Watch to appropriately reimburse River Watch  
5 for their investigation fees and costs, expert/consultant fees and costs, and reasonable attorneys’ fees  
6 incurred as a result of investigating and preparing the lawsuit and negotiating this Consent Decree.  
7 Payment shall be made payable to “River Watch” within ten (10) business days of the Effective Date via  
8 U.S. Mail.

9 **VI. DISPUTE RESOLUTION AND RETENTION OF JURISDICTION**

10 **A. Continuing Jurisdiction.** This Court shall retain jurisdiction over this matter until the  
11 Termination Date defined above for the purposes of implementing and enforcing the terms and  
12 conditions of this Consent Decree and adjudicating all disputes among the Parties that may arise under  
13 the provisions of this Consent Decree, unless a Party files and is granted a timely motion requesting an  
14 extension of time for the Court to retain jurisdiction. The Court shall have the power to enforce this  
15 Consent Decree with all available legal and equitable remedies, including contempt.

16 **B. Meet and Confer.** A Party to this Consent Decree shall invoke the dispute resolution procedures  
17 of this Section by notifying the other Party in writing of the matter(s) in dispute. The Settling Parties  
18 shall then meet and confer in good faith (either telephonically or in person) in an attempt to resolve the  
19 dispute informally over a period of fifteen (15) days from the date of the notice. The Parties may elect to  
20 extend this time in an effort to resolve the dispute without court intervention.

21 **C. Dispute Resolution.** If the Parties cannot resolve a dispute by the end of meet and confer  
22 informal negotiations, then the parties shall attempt to settle the dispute through mediation provided by  
23 the American Arbitration Association (“AAA”) pursuant to AAA’s Commercial Mediation Provisions in  
24 effect at the time the act or acts being disputed occurred.

25 **D. Burden of Proof.** In any dispute resolution proceeding, the Party invoking the dispute resolution  
26 procedures provided herein shall have the burden of demonstrating that the other Party has failed to meet  
27 its obligations as set forth herein.

28 **E. Enforcement Fees and Costs.** If formal dispute resolution is undertaken, then litigation costs

1 and fees incurred in conducting such shall be awarded to the prevailing party.

2 **VII. MUTUAL RELEASE OF LIABILITY AND COVENANT NOT TO SUE**

3 **A. River Watch's Public Release of Claims.** This Consent Decree is a final and binding resolution  
4 between River Watch, on their own behalf, and on behalf of the public and in the public interest, and  
5 Berger, and their parents, subsidiaries, affiliated entities under common ownership, directors, officers,  
6 agents, employees, attorneys (collectively "Releasees"), and shall have a preclusive effect such that no  
7 other person or entity, whether purporting to act in his, her, or its interests or the public interest shall be  
8 permitted to pursue and/or take any action with respect to any violation of the CWA that was alleged in  
9 the Complaint regarding the Facility, or that could have been brought pursuant to the Notice regarding  
10 the Facility.

11 **B. River Watch's Release of Additional Claims.** As to River Watch for an in its individual  
12 capacity only, this Consent Decree shall have preclusive effect such that it shall not be permitted to  
13 pursue and/or take any action with respect to any other statutory or common law claim, to the fullest  
14 extent that any of the foregoing were or could have been asserted by it against Berger or the Releasees  
15 based on the facts alleged in the Complaint and the Notice regarding the Facility, whether or not based  
16 on actions committed by Berger.

17 **C. Waiver of Rights Under Section 1542 of the California Civil Code**

18 1. With regard to the Facility River Watch acting in its individual capacity waives all rights  
19 to institute any form of legal action, and releases all claims against Berger, and the Releasees,  
20 (referred to collectively in this Section as the "Claims"). In furtherance of the foregoing, River  
21 Watch waives any and all rights and benefits which it now has, or in the future may have,  
22 conferred upon it with respect to the Claims by virtue of the provisions of § 1542 of the  
23 California Civil Code, which provides as follows:

24 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR  
25 DOES NOT KNOW OR SUSPECT EXIST IN HIS FAVOR AT THE TIME OF EXECUTING  
26 THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED  
27 HIS SETTLEMENT WITH THE DEBTOR.

28 2. With regard to the Facility, River Watch understands and acknowledge that the

1 significance and consequence of this waiver of California Civil Code § 1542 is that even if River  
2 Watch suffers future damages arising out of or resulting from, or related directly or indirectly to,  
3 in whole or in part, the facts in the Complaint, River Watch will not be able to make any claim  
4 for those damages against Releasees.

5 **D. Berger's Release of River Watch.** Berger, on behalf of itself, its past and current agents,  
6 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against River  
7 Watch, its attorney, and other representatives for any and all actions taken or statements made (or those  
8 that could have been taken or made) by River Watch and its attorney and other representatives, whether  
9 in the course of investigating Claims or Otherwise.

10 **E. Parties' Release.** Unless specifically provided for in this Consent Decree, the Parties, on their  
11 own behalf and on behalf of their current and former officers, directors, employees, and each of their  
12 successors and assigns, and their agents, and other representatives release all persons including, without  
13 limitation, all other Parties to this Consent Decree (and each of their direct and indirect parent and  
14 subsidiary companies and affiliates, and their respective current and former officers, directors, members,  
15 employees, shareholders, and each of their predecessors, successors, and assigns, and each of their  
16 agents, attorneys, consultants, and other representatives) from any additional attorney's fees or expenses  
17 related to the resolution of this matter.

18 **F.** Nothing in this Consent Decree limits or otherwise affects any Party's right to address or take  
19 any position that it deems necessary or appropriate in any formal or informal proceeding before the State  
20 Board, Regional Board, EPA, or any other administrative body on any other matter relating to Berger's  
21 compliance with the Permit or the Clean Water Act occurring or arising after the effective date of this  
22 Consent Decree.

## 23 **VIII. MISCELLANEOUS PROVISIONS**

24 **A. No Admission of Liability.** Neither this Consent Decree, the implementation of additional  
25 BMPs, nor any payment pursuant to the Consent Decree shall constitute or be construed as a finding,  
26 adjudication, admission, or acknowledgment of any fact, law, or liability, nor shall it be construed as an  
27 admission of violation of any law, rule, or regulation. Berger maintains and reserves all defenses they  
28 may have to any alleged violations that may be raised in the future.

1 **B. Construction.** The language in all parts of this Consent Decree shall be construed according to  
2 its plain and ordinary meaning, except as to those terms defined in the Permit, the Clean Water Act, or  
3 specifically herein.

4 **C. Choice of Law.** The laws of the United States shall govern this Consent Decree.

5 **D. Severability.** In the event that any provision, paragraph, section, or sentence of this Consent  
6 Decree is held by a court to be unenforceable, the validity of the enforceable provisions shall not be  
7 adversely affected.

8 **E. Correspondence and Notices.** Any and all notices and/or correspondence between the Parties  
9 provided for or permitted under this Consent Decree shall be in writing and personally delivered or sent  
10 by:

11 1. First-class (registered or certified) mail return receipt requested; or

12 2. Overnight or two-day courier on any Party by the other Party to the following addresses:

13 If to River Watch:

14 David Weinsoff (SBN 141372)  
15 Law Office of David J. Weinsoff  
16 138 Ridgeway Avenue  
17 Fairfax, CA 94930  
18 Tel: 415.460.9760  
19 Email: [david@weinsofflaw.com](mailto:david@weinsofflaw.com)

20 If to Berger:

21 Martin Reyes  
22 Berger/Sun-Land Garden Products  
23 90 Pioneer Road  
24 Watsonville, CA 95076  
25 Tel: 832.724.6500  
26 Email: [martinr@berger.ca](mailto:martinr@berger.ca)

27 With Copy to:

28 Opper & Varco LLP  
Attn: S. Wayne Rosenbaum, Esq.  
225 Broadway, Suite #1900  
San Diego, CA 92101  
Tel: 619.231.5859  
Email: [swr@envirolawyer.com](mailto:swr@envirolawyer.com)

Any change of address or addresses shall be communicated in the manner described above for giving

1 notices.

2 **F. Counterparts.** This Consent Decree may be executed in any number of counterparts, all of  
3 which together shall constitute one original document. Telecopy, email of a .pdf signature, or facsimile  
4 copies of original signature shall be deemed to be originally executed counterparts of this Consent  
5 Decree.

6 **G. Modification of the Consent Decree.** This Consent Decree, and any provisions herein, may not  
7 be changed, waived, discharged, or terminated unless by a written instrument, signed by the Settling  
8 Parties, or upon motion of any Party as provided by law and upon an entry of a modified Consent  
9 Decree by the Court. If any Settling Party wishes to modify any provision of this Consent Decree, the  
10 Settling Party must notify the other Settling Party in writing at least thirty (30) days prior to taking any  
11 step to implement the proposed change.

12 **H. Full Settlement.** This Consent Decree contains the sole and entire agreement and understand of  
13 the Parties with respect to the entire subject matter hereof, and any and all discussions, negotiations,  
14 commitments and understandings related thereto. No representations, oral or otherwise, express or  
15 implied, other than those contained herein have been made by any party hereto. No other agreements not  
16 specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

17 **I. Integration Clause.** This is an integrated Consent Decree. This Consent Decree is intended to be  
18 a full and complete statement of the terms of the Consent Decree between the Settling Parties and  
19 expressly supersedes any and all prior oral or written Consent Decrees, covenants, representations, and  
20 warranties (express or implied) concerning the subject matter of this Consent Decree.

21 **J. Authority of Counsel.** The undersigned representatives for River Watch and Berger each certify  
22 that he/she is fully authorized by the party whom he/she represents to enter into the terms and conditions  
23 of this Consent Decree.

24 **K. Authority of Parties.** The Settling Parties certify that their undersigned representatives are fully  
25 authorized to enter into this Consent Decree, to execute it on behalf of the Settling Parties, and to legally  
26 bind the Settling Parties to its terms.

27 **L.** The Settling Parties, including any successors or assigns, agree to be bound by this Consent  
28 Decree and not to contest its validity in any subsequent proceeding to implement or enforce its terms.

1 **IX. COURT APPROVAL**


2 The Parties hereby respectfully request that the Court promptly approve and enter this Consent Decree.  
3 Upon entry of this Consent Decree, River Watch and Defendant waive their respective rights to a  
4 hearing or trial on the allegations of the Complaint and Notice which are at issue in this action. If this  
5 Consent Decree is not approved by the Court, it shall be of no force and effect, and it may not be used in  
6 any proceeding for any purpose.

7 **IN WITNESS WHEREOF**, the undersigned have executed this Consent Decree as of the date  
8 first set forth below.

9  
10 **APPROVED AS TO CONTENT**

11 Dated: October 7, 2016

**RIVER WATCH**

12  
13  
14 By:   
15 Name: Lallye Hanson  
16 Title: President

17 Dated: \_\_\_\_\_

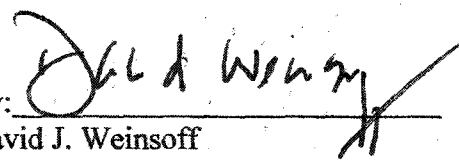
**BERGER**

18  
19  
20 By: \_\_\_\_\_  
21 Name: \_\_\_\_\_  
22 Title: \_\_\_\_\_

23 **APPROVED AS TO FORM**

24 Dated: 10.7.16

**LAW OFFICE OF DAVID J. WEINSOFF**

25  
26 By:   
27 David J. Weinsoff  
28 Attorney for River Watch

Dated: \_\_\_\_\_

**OPPER & VARCO LLP**

1 **IX. COURT APPROVAL**

2 The Parties hereby respectfully request that the Court promptly approve and enter this Consent Decree.  
3 Upon entry of this Consent Decree, River Watch and Defendant waive their respective rights to a  
4 hearing or trial on the allegations of the Complaint and Notice which are at issue in this action. If this  
5 Consent Decree is not approved by the Court, it shall be of no force and effect, and it may not be used in  
6 any proceeding for any purpose.

7 **IN WITNESS WHEREOF**, the undersigned have executed this Consent Decree as of the date  
8 first set forth below.

9  
10 **APPROVED AS TO CONTENT**

11 Dated: \_\_\_\_\_

**RIVER WATCH**

12  
13  
14 By: \_\_\_\_\_

Name:

Title:

15  
16  
17 Dated: 14 Oct 2016

**BERGER**

18  
19 By: 

Name: MELISSA BERGER

Title: C-E-O

20  
21 **APPROVED AS TO FORM**

22  
23  
24 Dated: \_\_\_\_\_

**LAW OFFICE OF DAVID J. WEINSOFF**

25  
26 By: \_\_\_\_\_

David J. Weinsoff

Attorney for River Watch

27  
28 Dated: \_\_\_\_\_

**OPPER & VARCO LLP**



1 **IX. COURT APPROVAL**

2 The Parties hereby respectfully request that the Court promptly approve and enter this Consent Decree.  
3 Upon entry of this Consent Decree, River Watch and Defendant waive their respective rights to a  
4 hearing or trial on the allegations of the Complaint and Notice which are at issue in this action. If this  
5 Consent Decree is not approved by the Court, it shall be of no force and effect, and it may not be used in  
6 any proceeding for any purpose.

7 **IN WITNESS WHEREOF**, the undersigned have executed this Consent Decree as of the date  
8 first set forth below.

9  
10 **APPROVED AS TO CONTENT**

11 Dated: \_\_\_\_\_

**RIVER WATCH**

12  
13  
14 By: \_\_\_\_\_  
15 Name:  
16 Title:

17 Dated: \_\_\_\_\_

**BERGER**

18  
19  
20 By: \_\_\_\_\_  
21 Name:  
22 Title:

23 **APPROVED AS TO FORM**

24 Dated: \_\_\_\_\_

**LAW OFFICE OF DAVID J. WEINSOFF**

25  
26 By: \_\_\_\_\_  
27 David J. Weinsoff  
28 Attorney for River Watch

Dated: Oct. 14, 2016

**OPPER & VARCO LLP**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

By: S. Wayne Rosenbaum  
S. Wayne Rosenbaum  
Attorney for Berger

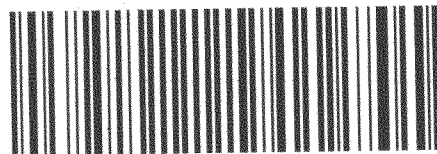
**IT IS SO ORDERED.**

Effective Date: \_\_\_\_\_

\_\_\_\_\_  
The Honorable Elizabeth D. Laporte  
United States District Court Magistrate Judge  
Northern District of California

Law Office of David J. Weinsoff  
138 Ridgeway Avenue  
Fairfax, CA 94930

**CERTIFIED MAIL™**

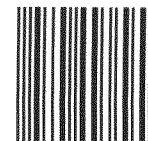


7013 0600 0000 2746 3236

RETURN RECEIPT  
REQUESTED



1000



20044

U.S. POSTAGE  
PAID  
KEIZER, OR  
97303  
OCT 17 16  
AMOUNT

**\$8.62**

R2304H108533-02

DEPT. OF JUSTICE - ENRD  
ENVIRONMENT DIVISION

Citizen Suit Coordinator  
U.S. Department of Justice  
Environment and Natural Resource Division  
Law and Policy Section  
P.O. Box 7415  
Ben Franklin Station  
Washington, DC 20044-7415

X-RAYED

OCT 20 2016

DOJ MAILROOM

**DOJ-FASS**  
To: ENRD/LANDS  
Building: MAIN  
Room # PICK-UP  
Department:



70130600000027463236

FROM: LAW OFF OF DAVID J. WEINSOFF  
CARR: United States Postal Service  
TRK#: 70130600000027463236  
RCVD: 10/21/2016 1212

TO: Reed, Jason  
PH: 202/353/7550  
BDG: PHB  
RM: 2121  
PCS: 1



9999000091245

RTE:  
MSC:  
**Reed, Jason**